Supreme Court, U.S.
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No. 09-787

In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

SOMPO JAPAN INSURANCE COMPANY OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Kawasaki Kisen Kaisha Ltd. et al. v. Regal-Beloit Corporation et al.*, Nos. 08-1553 and 08-1554 (consolidated), this Court will decide (*inter alia*) whether the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §11706 (rail carriers), *id.* §14706 (motor carriers), applies at all to the inland rail portion of an international, multimodal import shipment governed by a "through" bill of lading (*i.e.*, a bill of lading that covers the shipment from origin to destination). If this Court determines that Carmack does apply to such shipments, it will clarify the ICA's requirements for contracting out of Carmack. Relying solely on its decision in *Sompo Japan Insurance Co. of America v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006), the Second Circuit held in two related cases that the Carmack Amendment applies to such shipments and that parties may not contract out of Carmack unless terms consistent with Carmack are first offered directly to the overseas shipper.

The question presented is:

Whether the Second Circuit erred by holding, in conflict with other circuits, that the Carmack Amendment displaces the liability terms that the carriers, shippers, and shipping intermediaries agreed would govern these international "through" import shipments.

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INTRODUCTION

In these two related cases (referred to herein as the "*Sompo II* cases") the Second Circuit reaffirmed its holdings in *Sompo Japan Insurance Co. of America v. Union Pacific Railroad Co.*, 456 F.3d 54 (2d Cir. 2006) ("*Sompo I*"), that the Carmack Amendment applies to import shipments covered by a through bill of lading and that shipping parties may not opt out of Carmack unless Carmack terms are first offered to the original shipper abroad. Both of those holdings were adopted by the Ninth Circuit in *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985 (9th Cir. 2009), and are currently before this Court in *Kawasaki Kisen Kaisha Ltd. et al. v. Regal-Beloit Corporation et al.*, Nos. 08-1553 and 08-1554 (consolidated) ("*Regal-Beloit*"). Argument was held on March 24, 2010.

These cases are factually indistinguishable from *Regal-Beloit* and should be held and then resolved in the same manner. Respondents' counter-arguments rest on a misunderstanding of the arguments in *Regal Beloit* and an entirely meritless suggestion that Justice Sotomayor could have a conflict.

ARGUMENT

1. These two cases are factually indistinguishable from *Regal-Beloit*. Both involve cargo loss alleged to have occurred during the inland leg of import shipments moving under a through bill of lading, and rail service contracts between the ocean carrier and Union Pacific that incorporate the same pertinent terms from UP's standard Master Intermodal Transportation Agreement ("MITA").

The only difference is that in *Regal-Beloit* the issue is whether Carmack trumps the forum selection clause in the ocean carrier's bill of lading, whereas these cases

have focused on the Carriage of Goods by Sea Act *liability* limitations incorporated into the bill of lading. That difference would be pertinent only if this Court did not reach the main issues in *Regal-Beloit* and reversed solely on the ground that 49 U.S.C. §10502(e) speaks only of Carmack "terms for liability and claims" but not venue. *See Regal-Beloit* Tr. of Oral Arg. at 39, 41-42; UP *Regal-Beloit* Reply 28. If this Court resolves *Regal-Beloit* any other way, its resolution should be appropriate for these cases as well.

2. Respondents assert that these cases are materially distinguishable from *Regal-Beloit* because here the downstream rail carrier issued "separate bills of lading" for the inland legs of the shipments. Opp. 5. That argument is both legally irrelevant and factually incorrect.

a. Respondents misunderstand the issues in *Regal-Beloit* and the historic nature and significance of a "separate" inland bill of lading. As explained at length in the merits briefs of the parties and the brief of the United States as Amicus Curiae in *Regal-Beloit*, if (as here) a through bill of lading has been issued to the inland destination it does not matter in any way whether additional inland bills of lading are issued. *See, e.g.*, UP *Regal-Beloit* Pet. 32-33; UP *Regal-Beloit* Opening Br. 33-34 & n.6; U.S. *Regal-Beloit* Br. 28-29 & n.11; UP *Regal-Beloit* Reply 14-15. Carmack applies to the inland leg of an import shipment *only* if the ocean bill of lading terminates at the U.S. port of entry. If so, any additional domestic movement is an entirely new shipment originating in the United States, and the first inland U.S. carrier "receives" property for domestic transportation within the meaning of Carmack. *See Reider v. Thompson*, 339 U.S. 113 (1950).

For a century, before and after the 1978 recodification that arguably introduced some ambiguity as to Carmack's reach, the courts and the ICC consistently recognized that Carmack does not apply to the inland leg of *any* import shipment moving under a through bill of lading from a foreign origin to an inland U.S. destination.[1] That settled law was not concerned with whether a downstream carrier issued its own bill of lading. And those historical limitations are still embodied in the current text, in two ways.

First, Carmack is triggered only when a "rail carrier providing transportation or service subject to the jurisdiction of the [STB] ... receives [property] for transportation under this part." 49 U.S.C. §11706(a). Only the first carrier receiving property from the shipper at the point of origin of the shipment "receives" property for transportation within the meaning of Carmack. In a through movement, the first carrier in the United States does not receive property for transportation. If it did, Carmack would *always* have

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[1] *See, e.g., Sklaroff v. Pa. R.R. Co.*, 184 F.2d 575, 575 (3d Cir. 1950); *Strachman v. Palmer*, 82 F. Supp. 161, 153-64 (D. Mass. 1949), *aff'd in relevant part*, 177 F.2d 427 (1st Cir. 1949); *Reider v. Thompson*, 176 F.2d 13, 15 (5th Cir. 1949), *rev'd on other grounds*, 339 U.S. 113 (1950); *Kenny's Auto Parts, Inc. v. Baker*, 478 F. Supp. 461, 463-64 (E.D. Pa. 1979); *Condakes v. Smith*, 281 F. Supp. 1014, 1015 (D. Mass. 1968); *Becker & Co. v. Wabash R.R. Co.*, 55 N.W.2d 776, 778-79 (Mich. 1952); *Carr v. Erie Lackawanna R.R. Co.*, 85 Misc. 2d 713, 714 (N.Y. Sup. Ct. 1972); *Leary v. Aero Mayflower Transit Co.*, 207 S.E.2d 781, 788 (N.C. Ct. App. 1974); *Whaling v. Atlas Van Lines, Inc.*, 919 F. Supp. 168, 170 (E.D. Pa. 1996); *Alwine v. Pa. R.R. Co.*, 15 A.2d 507, 508 (Pa. Super. Ct. 1940); *Balt. & Ohio R.R. Co. v. Montgomery & Co.*, 90 S.E. 740, 740-41 (Ga. Ct. App. 1916); *In re Bills of Lading*, 52 I.C.C. 671, 726-29 (1919); *Heated Car Serv. Regulations*, 50 I.C.C. 620, 623-24 (1918); *In re Cummins Amendment*, 33 I.C.C. 682, 693 (1915).

covered the inland leg of import through shipments—even between 1906 and 1915 when Carmack applied only to a carrier "receiving property for transportation from a point in one State to a point in another State,"[2] or from 1915 to 1978 when it applied to carriers "receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country."[3] But as one court explained in 1979, "[t]he cases interpreting the Carmack Amendment have *uniformly* held that the Carmack Amendment has no application to goods received for shipment at a point outside the United States." *Kenny's Auto Parts, Inc. v. Baker*, 478 F. Supp. 461, 464 (E.D. Pa. 1979) (emphasis added).

That was firmly settled law, and essential to Carmack's purpose of promoting unified responsibility in the first carrier for the entire voyage, under consistent terms. *See Atl. Coast Line R.R. Co. v. Riverside Mills*, 219 U.S. 186, 195-96 (1911). If a mid-stream carrier could be a Carmack "receiving" carrier then the shipper must prove that the midstream carrier received the goods "in good order and condition" and the law governing the damage would depend on where it occurred. *Reider v. Thompson*, 339 U.S. 113, 118 (1950). "Such a construction of the Carmack Amendment would defeat its purpose, which was to relieve shippers of the difficult, and often impossible, task, of determining on which of the several connecting lines the damage occurred." *Mo., Kan., &*

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[2] Act of June 29, 1906, ch. 3591, §7, 34 Stat. 584, 595.

[3] Act of March 4, 1915, ch. 176, 38 Stat. 1196, 1197.

Tex. Ry. Co. v. Ward, 244 U.S. 383, 387 (1917). The modern movement of sealed containers by ocean and land makes that problem all the more acute. As this Court recognized in *Norfolk Southern Railway Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 18-19 (2004), through bills extending COGSA terms inland solve these problems for ocean through shipments in much the same way that Carmack does for purely domestic commerce and exports to Canada and Mexico. But neither Carmack nor COGSA can achieve their intended purpose if they are interpreted to overlap.

Although the present statutory language differs in other ways, it uses the "receives for transportation" language in exactly the same way Carmack always has. Indeed, respondents essentially conceded at argument in *Regal-Beloit* that Union Pacific is not the "receiving" carrier in an import through movement even though it may be the first carrier in the United States. *See Regal-Beloit* Tr. of Oral Arg. at 39; *see also id.* at 20-21 (argument of the United States) (citing *Mexican Light & Power Co. v. Tex. Mexican Ry. Co.*, 331 U.S. 731 (1947); *Galveston Wharf Co. v. Galveston, Harrisburg & San Antonio Ry. Co.*, 285 U.S. 127 (1932); *St. Louis, Iron Mountain & S. Ry. Co. v. Starbird*, 243 U.S. 592 (1917); *Ward*, 244 U.S. 383; *Riverside Mills*, 219 U.S. 186). And the present venue provisions confirm that the receiving carrier is the carrier at the point of origin of the shipment, by using the terms "receiving" carrier and "originating" carrier interchangeably, and by providing for venue over that carrier only in the (U.S.) "judicial district in which the point of origin is located." 49 U.S.C. §11706(d).

Second, the historic language limiting Carmack to transportation "in the United States or from a place in

the United States to a place in an adjacent foreign country when transported under a through bill of lading" is still right there in the statute—it just appears at the end of the third sentence of §11706(a). *See* U.S. *Regal-Beloit* Br. 21-23; UP *Regal-Beloit* Reply 10-11. The historic meaning of that language (and the only interpretation that does not render everything after "in the United States" superfluous) is that it excludes the inland leg of any import through shipment and any export through shipment to a non-adjacent foreign country. The indentation that makes that language appear to be a part of subclause (a)(3) was introduced by stylistic changes to the text of the 1995 ICCTA that surely were not intended to change the meaning. *Compare* Pet.App.146a (1978 version) *with* Pet.App.116a (current version). That indentation does not appear in either of the parallel Carmack provisions governing liability of motor carriers and pipeline carriers, respectively. *See* 49 U.S.C. §14706 (Pet.App.120a), *id.* §15906. And reading that clause as modifying only connecting carriers under §11706(a)(3) would produce absurd results. Congress obviously did not intend for Carmack to apply to the inland legs of through shipments in foreign trade but arbitrarily not to segments on connecting lines.[4]

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[4] Assuming, for example, that "in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading" is given its historic meaning, that language would not embrace even a domestic inland leg of an export through shipment bound for a non-adjacent foreign country. If it modifies only subclause (a)(3), then in an export through shipment from Oklahoma to Japan the receiving carrier in the United States would be liable for damage on its own line from Oklahoma to New Mexico, but *not* for damage on a connecting rail segment from New Mexico to California.

Respondents suggest that even if there is an ocean bill of lading extending all the way to the destination, a connecting rail carrier in the United States could break the chain of transportation and transform itself into a Carmack "receiving" carrier by issuing a separate bill of lading. That misconception is drawn from imprecise language used in *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987), and quoted in several other recent cases. But Carmack is not triggered by issuance of a bill of lading. Carmack is triggered when a carrier meeting its requirements receives property for transportation. That carrier is *then* obliged to issue a bill of lading. This Court has always held that once a Carmack through bill has been issued any duplicative downstream bills of lading that might be issued are irrelevant and void—proving that a bill of lading *evidences* Carmack obligations, it does not *create* them. *See Mexican Light & Power*, 331 U.S. at 733-34; *Ward*, 244 U.S. at 387; U.S. *Regal-Beloit* Br. 28 & n.11.

Carmack applies when it applies, and is not affected by whether downstream carriers exchange slips of paper that Carmack does not require or care about. Respondents' suggestion that a remand is necessary here to inquire into whether Union Pacific's "domestic waybills" constitute "bills of lading" illustrates the absurdity of their position. Downstream carriers have to exchange *something* to acknowledge the transfer of goods, where they are going, and the contractual terms under which they are moving. UP generally sends

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Reading that language to constrain all of the obligations imposed by Carmack, as it did historically, makes clear that Carmack does not apply at all to commerce with non-adjacent countries.

electronic waybills—which are not bills of lading but essentially just emails to the carrier from which UP has accepted the shipment for connecting movement. But the statute provides no guidance about whether a particular notification or confirmation document is a "bill of lading" or something else. Carmack does not draw a rigid distinction between bills of lading and other documentation; it requires a "receipt or bill of lading" from the receiving carrier but is ultimately indifferent as to the form of that document or even whether it is issued at all. *See* 49 U.S.C. §11706(a) ("Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier.").

b. In any event, the courts below did *not* find that separate bills of lading were issued for the inland legs. *Contra* Opp. 5. Judge Batts found that the only bill of lading governing each shipment was the through bill of lading issued by "K"-Line. *See* Pet.App.18a-20a. Similarly, Judge Duffy found that "through bills of lading were issued by MOL to Kubota covering the entire shipment from Tokyo to Georgia" and recognized that any inland bill could have no effect on whether Carmack applies. Pet.App.6a. On remand after *Sompo I*, Judge McMahon then held that the Second Circuit's holding concerning the applicability of Carmack was law of the case and therefore did not consider this issue. *See* Pet.App.74a.

Respondents do not and cannot dispute that a through bill governs the import shipments at issue in the *Sompo II* cases. A holding in *Regal-Beloit* that Carmack does not apply to through shipments originating in a nonadjacent foreign country would therefore require reversal here too. As explained above, UP's domestic waybills could not change that

result even if they *were* bills of lading (although they are not).

c. Finally, respondents' proposed distinction will be irrelevant if this Court concludes in *Regal-Beloit* that UP can contract out of Carmack because the MITA is a contract under 49 U.S.C. §10709, or because Carmack-compliant terms were effectively available to the ocean carrier.

3. Respondents suggest that even if a hold would otherwise be appropriate, this Court should decide now to let these erroneous rulings stand, rather than await disposition of *Regal-Beloit*, because one Member of the Court sat on the *Sompo II* panel. Opp. 8-9. Respondents correctly concede that there is no reason for Justice Sotomayor to recuse herself from *Regal-Beloit* simply because she was a member of the *Sompo II* panel, which held only that it was bound by prior Second Circuit precedent directly on point (*Sompo I*). The mere pendency of these petitions cannot possibly change that analysis.

If Justice Sotomayor believed that her participation in the non-substantive *Sompo II* panel decision made it inappropriate for her to participate in considering *these* petitions then of course she could recuse herself from these petitions without affecting her participation in *Regal-Beloit*. The rest of this Court can and should resolve these petitions in the usual and appropriate manner without regard to that decision. If that somehow produced an evenly divided Court—which would of course favor *respondents*, who prevailed below—then so be it. (And for the record Union Pacific sees absolutely no reason why Justice Sotomayor should recuse herself from any of these matters.)

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Regal-Beloit* and then granted and reversed or remanded, as appropriate, in light of this Court's decision.

Respectfully submitted,

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